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2
3 HYPHY MUSIC, INC.,

4 Counterclaimant,

5 v.

6
7 YELLOWCAKE, INC., COLONIZE
8 MEDIA, INC., JOSE DAVID
9 HERNANDEZ, JESUS CHAVEZ, SR.,

10 Counterdefendants.
11
12

13 KEVIN BERGER, declares under penalty of perjury the following to be true and
14 correct pursuant to 28 U.S.C. § 1746:

15 1. I am the President of the Plaintiff/Counterdefendant, Yellowcake, Inc.
16 (“Yellowcake”). As such, I am fully familiar with the facts set forth and circumstances
17 described herein.

18 2. I submit this declaration in support of Yellowcake’s Motion for Summary
19 Judgment pursuant to Federal Rule of Civil Procedure 56.

20 3. Yellowcake is primarily engaged in the business of, among other things,
21 purchasing, owning, licensing and exploiting intellectual property rights.

22 4. Among the musical acts with whom Yellowcake has acquired an intellectual
23 property right(s) is Jesus Chavez Sr. (“Chavez”). Chavez is a legend in the Mexican
24 music genre who performs with backing musicians under the name Los Originales de
25 San Juan (the “Band”).

26 5. Yellowcake’s attorneys advise me that Hyphy Music, Inc. has acknowledged
27 in their filings in this lawsuit that Chavez was the founder, owner and principal of the
28 Band, and that Hyphy previously obtained their former rights to distributed the Albums

1 at issue in this lawsuit directly from Chavez and Chavez alone.

2 6. Between 2013 and 2015, the Band recorded the following six albums: (i) Los
3 Originales de San Juan- *El Campesino*; (ii) Los Originales de San Juan-*Corridos de*
4 *Poca M*; (iii) Los Originales de San Juan-*En Vivo Desde La Cantina de Mi Barrio*; (iv)
5 Los Originales de San Juan- *Nuestra Historia En Vivo*; (v) Los Originales de San Juan-
6 *Amigos y Contrarios*; and (vi) Los Originales de San Juan-*Naci Con Suerte de Rey Con*
7 *Mariachi* (collectively, “Albums”).

8 7. Beginning in or around the beginning of 2019, Yellowcake wished to
9 purchase the intellectual property rights owned by Chavez, including the Albums, and
10 entered into negotiations with Chavez to accomplish same.

11 8. While negotiating the terms of any such acquisition of Chavez’s and the
12 Band’s intellectual property rights, including in the Albums, Yellowcake did its “due
13 diligence” to determine what, if any, copyright registrations already existed for the
14 Albums.

15 9. Upon Yellowcake’s search of the United States Copyright Office,
16 Yellowcake determined that no other individual or entity filed any documentation with
17 the Copyright Office to assert an ownership claim in the Albums.

18 10. On or about March 21, 2019, Yellowcake and Chavez entered into an Asset
19 Purchase and Assignment Agreement (hereinafter referred to as the “APA Agreement”),
20 whereby Yellowcake purchased Chavez’s entire ownership of the rights, title and
21 interest in Chavez’s catalog of sound recordings, including the Albums for five hundred
22 thousand dollars (\$500,000.00) and free and clear of all encumbrances.

23 11. A true and correct copy of the APA Agreement is annexed to the Declaration
24 of Seth L. Berman, Esq. (“Berman Declaration”).

25 12. Following the APA Agreement, Yellowcake complied with all requirements
26 set forth by the Copyright Act, 17 U.S.C. § 101, *et seq.*, by registering copyrights for
27 each Album acquired by the APA Agreement and recorded the written assignment with
28 the United States Copyright Office.

1 13. The United States Copyright Office issued Plaintiff a Certificate of
2 Registration for each copyrighted Album.

3 14. Once Yellowcake acquired the rights in the Albums, they were distributed
4 through Colonize Media Inc. (“Colonize”), a digital music distributor that Yellowcake
5 uses to distribute many of the sound recordings in its catalog.

6 15. Colonize distributed the Albums on multiple digital service provider
7 platforms, such as Spotify, YouTube, iTunes, Apple Music and Amazon Music
8 (collectively “Retail Platforms”), which then make the sound recordings accessible to
9 consumers.

10 16. After the APA Agreement had been executed and the United States
11 Copyright Office issued Certificates of Registration for each Album, Hyphy Music
12 engaged in the exploitation of Yellowcake’s copyrighted Albums in direct violation of
13 Yellowcake’s exclusive rights provided by 17 U.S.C. § 106 by selling, reproducing,
14 synchronizing, distributing, and publicly performing the Albums on various digital
15 service provider platforms.

16 17. Specifically, Hyphy sold copies of the Albums on iTunes and created and/or
17 uploaded and/or facilitated the uploading of videos containing songs on the copyrighted
18 Albums to YouTube.

19 18. In or about June 2020, Yellowcake was notified by Colonize that it
20 discovered that “conflicts” had arisen on a number of digital service provider platforms
21 because Hyphy was distributing the Albums purchased by Yellowcake.

22 19. As a result of these conflicts, Yellowcake sent “Takedown Notices” to
23 YouTube pursuant to YouTube’s internal protocols and in compliance with 17 U.S.C.
24 § 512 *et seq.* to assert its ownership rights in the Albums.

25 20. Notwithstanding the fact that Yellowcake sent the “Takedown Notices,”
26 Hyphy continued to unlawfully sell the Albums through multiple digital service
27 providers. A true and correct copy of the notice of infringement sent by Yellowcake to
28 Hyphy’s distributor, The Orchard, is attached to the Berman Declaration.

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1 21. It is my understanding that Hyphy never brought a declaratory judgment or
2 any other actions claiming ownership of the Albums, did not attempt to file copyright
3 registrations in the Albums until after Yellowcake filed this action, and made no other
4 claim of ownership of the Albums until Yellowcake sued Hyphy in this action.

5 22. It is my understanding that Hyphy Music has generated significant revenue
6 from its willful infringement of the Albums and continues to benefit from said
7 unauthorized exploitations to Yellowcake's detriment and that Yellowcake is entitled to
8 disgorge \$120,000 in profits from Hyphy.

9 23. As such, it is my understanding that Yellowcake is entitled to disgorge these
10 amounts from Hyphy as well as Yellowcake's lost profits.

11 24. Furthermore, it is my understanding that Hyphy is not a co-owner of the
12 Albums as set forth in the accompanying Memorandum of Points and Authorities and
13 that any such claim by Hyphy does not prevent Yellowcake from being entitled to
14 summary judgment.

15 25. It is also my understanding that Hyphy has asserted a claim of copyright
16 infringement against Yellowcake alleging that Yellowcake used Hyphy's allegedly
17 copyrighted album artwork it created when it previously distributed the Albums
18 subsequently purchased by Yellowcake from Chavez.

19 26. Nothing could be further from the truth. Yellowcake never used Hyphy's
20 artwork. Yellowcake created its own new Album covers after it acquired the sound
21 recordings of the Albums from Chavez. Attached hereto as **Exhibit "A"** is a true and
22 correct comparison of Hyphy's artwork and Yellowcake's artwork for five of the
23 Albums. As the Court can see, the album covers are completely different.

24 27. It is my understanding that Hyphy is supporting its allegation by maintaining
25 that Yellowcake and Colonize distributed copies of the Albums using Hyphy's artwork
26 on an online music store named Daddy Kool Records.

27 28. However, Daddy Kool Records has never been a retail client of Yellowcake's
28 and Yellowcake never sold any sound recordings it owns through Daddy Kool Records,

1 let alone the Albums at issue in this lawsuit.

2 29. *In addition, I have reviewed the Daddy Kool Records website screenshots*
3 *relied on by Hyphy, and they do not mention or identify either Yellowcake or Colonize*
4 *in any way.*

5 30. In fact, after I became aware of the allegation that Yellowcake had allegedly
6 used Hyphy's artwork on Daddy Kool Records, Yellowcake and Colonize investigated
7 the allegation. Not only did I confirm that Yellowcake did not upload or distribute the
8 Los Originales albums using Hyphy's artwork to Daddy Kool Records, I also confirmed
9 that Yellowcake has never distributed anything to Daddy Kool Records at all.
10 *Yellowcake also discovered that in fact it was Hyphy Music, in corroboration with*
11 *Morena Music, Inc. doing business as Long Play Music, Inc., who uploaded the albums*
12 *to Daddy Kool Records and is now attempting to pass off such acts as being attributed*
13 *to Yellowcake.*

14 31. Colonize found that Daddy Kool Records received the Albums, with
15 Hyphy's artwork, from Morena, through Hyphy and Morena's distributor, The Orchard.

16 32. Furthermore, it is my understanding that Hyphy did not produce these alleged
17 screenshots of the album artwork until October 2022, almost two years after the
18 commencement of litigation and only on the eve of the first deadline to file summary
19 judgment motions which supports the inference that Hyphy manufactured this
20 "evidence" which is consistent with Hyphy's history of manufacturing evidence such as
21 the alleged assignment agreements from Chavez's former backing musicians.

22 33. Yellowcake's attorneys advised me that Hyphy's alleged evidence is
23 unsubstantiated, lacks a foundation, and makes no mention of Yellowcake anywhere.
24 Hyphy's attempt to pass the screenshots off as evidence of Yellowcake's acts when it
25 was uploaded by Morena is a fraud on the Court.

26 34. Accordingly, Yellowcake's attorneys advise me that Yellowcake is entitled
27 to summary judgment in its favor on its first cause of action for copyright infringement
28 and to summary judgment with regards to Hyphy's second cause of action for copyright

1 infringement related to the album artwork.

2 35. For all of the foregoing reasons, it is respectfully requested that this Court:
3 (i) grant Yellowcake's Motion for Summary Judgment pursuant to Federal Rule of Civil
4 Procedure 56 on its first cause of action for copyright infringement against Hyphy; (ii)
5 grant Yellowcake and Colonize's Motion for Summary Judgment pursuant to Federal
6 Rule of Civil Procedure 56 on Hyphy's second cause of action for copyright
7 infringement; (iii) issue a judgment holding that Hyphy is liable to Yellowcake for
8 damages in the amount of 120,000; (iv) issue a permanent injunction pursuant to 17
9 U.S.C. § 502 prohibiting Hyphy, Martinez, or any of their employees or agents from
10 exercising any of the rights provided by 17 U.S.C. § 106 with regards to the Albums;
11 and (v) such other and further relief as the Court may deem just and proper.

12 Dated: July 12, 2023

13 Respectfully submitted:

14 
15
16 KEVIN BERGER

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